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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

PERRYTON WHOLESALE, INC., a Corporation,
Petitioner,

vs.

PIONEER DISTRIBUTING COMPANY OF KANSAS, INC., a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

Opinion Below 2
Judgment Below 2
Jurisdiction 2
Questions Presented for Review 2
Statutes Involved 3
Statement of the Case 3
Argument and Authorities 7
I. Treble Damages for Intrastate Injury 7
II. Respondent's Exclusive Dealing Contracts Were Unreasonable Restraints of Petitioner's Interstate Competition Without Regard to Amount of Commerce Restrained 10
A. Because Such Contracts Violated State Law 10
B. Because Respondent Was a Monopolist 11
III. Relevant Market Was Rack Jobbing Market in Area of Competition 13
Conclusion 16
Appendix A1

Table of Cases

Apex Hosiery Co. v. *Leader*, 310 U.S. 469 10
Bedford Cut Stone Co. v. *Journeymen S. C. Ass'n*, 274 U.S. 37 9
Board of Trade v. *United States*, 246 U.S. 231 10
Brown Shoe Co. v. *United States*, 370 U.S. 294 ..... 14, 15
Chattanooga Foundry & P. Works v. Atlanta, 203 U.S. 390 9
Fashion Originators' Guild v. *Federal Trade Commission*, 312 U.S. 457 11
Foster & Kleiser Co. v. *Special Site Sign Co.*, 9 Cir., 85 F.2d 742, cert. den. 299 U.S. 613 9

International Boxing Club v. *United States*, 335 U.S. 242 13
International Salt Co. v. *United States*, 332 U.S. 392 11
Klor's v. *Broadway-Hale Stores*, 359 U.S. 207 11
Northern Pacific Railway Company v. *United States*, 356 U.S. 1 16
Page v. *Work*, 9 Cir., 290 F.2d 323, cert. den. 368 U.S. 875 9
Perryton Wholesale, Inc. v. *Pioneer Distributing Company of Kansas, Inc.*, 1965 Trade Cases ¶ 71,605 2
Standard Oil Co. v. *United States*, 221 U.S. 1 11
Standard Oil Company of California v. *United States*, 337 U.S. 293 11
United States v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377 13
United States v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586 14
United States v. *Paramount Pictures, Inc.*, 334 U.S. 131 14
White Bear Theatre Corp. v. *State Theatre Corp.*, 8 Cir., 129 F.2d 600 9
White Motor Company v. *United States*, 372 U.S. 253 10

TABLE OF STATUTES

15 U.S.C. 1 .....3, 8, 10
15 U.S.C. 14 ..... 3, 7
15 U.S.C. 15 .....2, 3, 5, 7, 8, 10
28 U.S.C. 1254(1) 2
28 U.S.C. 1332 3
Kan. St. Ann. 16-112 .....3, 6, 10

No. .....

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To The Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Perryton Wholesale, Inc., a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on November 9, 1965.[1]

1. The certified printed record is referred to as P.R. The subsequent certified record of proceedings in the Court of Appeals is referred to as Supp. R. The certified exhibit book is referred to as Ex. Book.

OPINION BELOW

The opinion of the Court of Appeals is reported in 1965 Trade Cases ¶ 71,605. It has not yet been published in the Federal Reporter. The opinion is printed herein at page A1.

No opinions were delivered by the District Court. Findings of fact and conclusions of law on the injunction aspect of the case are printed on pages 18-25 of the printed record. Findings of fact and conclusions of law on the damage aspect of the case are printed on pages 63-68 of the printed record.

JUDGMENT BELOW

Judgment of the Court of Appeals was entered on November 9, 1965. (Supp. R. 4)

JURISDICTION

Jurisdiction of this court is conferred by 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether section 4 of the Clayton Act (15 U.S.C. 15) requires allowance of treble damages and attorney fees for injury to respondent's intrastate business as a result of petitioner's unfair competition by reason of the fact that the same conduct resulted in minor injury to respondent's interstate business?

2. Whether respondent's restraint of interstate competition by means of exclusive dealing contracts consti-

tutes a restraint forbidden by section 1 of the Sherman Act without regard to the amount of commerce restrained in view of the fact

(a) that the contracts violate state law

(b) that respondent is an admitted monopolist?

3. If question 2 be answered in the negative, whether the volume of merchandise distributed by jobbers and wholesalers with whom petitioner and respondent as rack jobbers were not in competition is to be counted in determining whether a substantial amount of commerce had been restrained?

STATUTES INVOLVED

The following statutes are involved:

(a) 15 U.S.C. 1, printed *infra*, p. A10.

(b) 15 U.S.C. 14, printed *infra* p. A10.

(c) 15 U.S.C. 15, printed *infra* p. A11.

(d) Kan. St. Ann. 6-112, printed *infra* p. A11.

STATEMENT OF THE CASE

Insofar as it relates to questions presented by this petition, jurisdiction in the trial court was founded upon 15 U.S.C. 15 as to a count for treble damages for violation of 15 U.S.C. 1 and upon 28 U.S.C. 1332 as to a count for damages for common law unfair competition.

Petitioner appealed from a judgment awarding respondent treble damages and attorney fees and denying petitioner's counterclaim for treble damages for Sherman Act violations by respondent. (P.R. 25-28, 69) The Court of Appeals affirmed. (Supp. R. 4; *infra* p. A1)

Petitioner is a Texas corporation with its place of business at Perryton, Texas. Respondent is a Kansas corporation with its place of business at Wichita, Kansas. (P.R. 18)

Petitioner and respondent are both rack jobbers of non-food merchandise. (P.R. 18-19)

The business of a rack jobber was described in detail by respondent's president.

Rack jobbers see to it that the proper merchandise for the season is bought and that the stock is kept up to date (P.R. 94) They not only sell merchandise, but deliver it and place it on the display racks. (P.R. 94) Unsold merchandise may be exchanged for other merchandise. (P.R. 94) They handle Federal excise tax returns for their customers. (P.R. 285) Their principal customers are retail grocers who have little familiarity with the technique of merchandising non-food merchandise. For that reason retailers deal with rack jobbers. (P.R. 93-94)

Rack jobbers are service organizations. (P.R. 275) "There is a million places to get merchandise but merchandise with service is different." (P.R. 275) What they sell is not merchandise, but service. (P.R. 275) Rack jobbers form a distinct and separate trade from wholesalers or jobbers. (P.R. 93-94, 275) They buy on a different price and other basis from manufacturers than do other merchandising categories. (P.R. 275)

Respondent had been in the rack jobbing business in Western Kansas and Southeastern Colorado for several years. (Opin. *infra* p. A2) It was predominant in that area. (Opin. *infra* p. A2) In fact it had no competition except from local tobacco wholesalers in Dodge City and Liberal. (P.R. 281)

Petitioner became a rack jobber operating in Texas, Oklahoma and in Liberal, Kansas in 1960. (Opin. *infra* p. A2) About February 1, 1961, it commenced competing with respondent in Western Kansas and Southeastern Colorado. (Opin. *infra* p. A2)

In 1961 petitioner hired three of respondent's route salesman and a district sales manager employed by respondent. (P.R. 20) The trial court found that such conduct constituted unfair common law competition and a conspiracy forbidden by section 1 of the Sherman Act. (P.R. 23, 24)

The trial court found that respondent's interstate business with Colorado customers had been damaged to the extent of $2,590.31 and its intrastate business in Kansas had been damaged to the extent of $25,851.76. The court trebled both categories of damage, added an allowance of $12,500.00 for attorney fees and rendered judgment for $97,826.00. (Opin. *infra* pp. A5, A8) The Court of Appeals affirmed, adding an additional allowance of $4,500.00 attorney fees for services in that court. (Supp. R. 4)

Both the District Court and the Court of Appeals construed section 4 of the Clayton Act (15 U.S.C. 15) as requiring that intrastate damages as well as interstate damages be trebled. (P.R. 69; Opin. *infra* p. A8)

Respondent's dominance in the rack jobbing trade in Western Kansas (Opin. *infra* p. A2) had been sustained by restrictive covenants against competition by its route salesmen (Opin. *infra* p. A3) and by contracts with its customers providing that the customer would not buy from anyone other than respondent. (P.R. 13-14)

That form of contract was used exclusively until two or three years prior to trial (P.R. 109), when respondent

added housewares to its line of merchandise. (P.R. 113) Although in terms the form of contract is with respondent's president, the contracts are now held and performed by respondent. Unless cancelled for one reason or another the contracts are still in effect. (P.R. 109)

Since the addition of the housewares line, most new accounts have been signed to the new form of contract. (P.R. 114) There are probably more of the new form of contract in effect than of the old. (P.R. 113) Some stores have signed both forms of contract. (P.R. 114)

There was no direct testimony as to how many stores had signed the exclusive dealing contract. Respondent's president testified he didn't know. (P.R. 108) He also testified that practically all customers had signed one or the other or both forms of contract. (P.R. 108-109)

One of the accounts bound on the exclusive dealing contract was the C. O. Mammel chain of grocery stores. (P.R. 282-283, 294) The Mammel chain had notified respondent it was transferring its business from respondent to petitioner. (P.R. 279, 316) Respondent managed to retain the account by threatening suit on the contract. (P.R. 147, 279, 285) Respondent's sales to this chain in 1960 totaled $148,494.00. (Respondent's exhibit 9, pp. 2-4, Ex. Book)

The exclusive dealing contract related only to "drugs, cosmetics and other related articles of merchandise". (P.R. 13-14) However, this line of merchandise constituted approximately two-thirds of respondent's business in the area of competition. (Petitioner's exhibits A, B, F, Ex. Book, Petitioner did not sell phonograph records.)

The exclusive dealing contract was in direct violation of Kan. Stat. Ann. 16-112, *infra* p. A11.

Petitioner counterclaimed for Sherman Act damages resulting from the exclusive dealing contracts. Petitioner urged that since the restraint was illegal under state law, the restraint could not have any legitimate purpose and was necessarily a violation of section 1 of the Sherman Act. The Court of Appeals applied the Clayton Act test (15 U.S.C. 14) of whether competition had been foreclosed in a substantial share of the line of commerce.[2] The Court of Appeals concluded that the relevant market was the total sales at wholesale of the type of commodities sold by respondent, despite the testimony of respondent's president that the rack jobbing business in which petitioner and respondent were engaged was a merchandising category wholly separate and distinct from all other merchandising categories.[3] (Opin. *infra* pp. A9, A10) On the expanded market respondent's sales were only five per cent, an unsubstantial amount. (Opin. *infra* p. A10)

ARGUMENT AND AUTHORITIES

I

Treble Damages for Intrastate Injury

So far as we have been able to ascertain this case presents the first instance in which any court has passed upon the question of whether intrastate damages become subject to trebling with allowance for attorney fees under 15 U.S.C. 15 if accompanied by interstate damages no matter how slight.

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2. The Clayton Act was not applicable to the exclusive dealing contracts because they were not made in interstate commerce. (15 U.S.C. 14)

3. *Supra* p. 4; P.R. 93, 94, 275.

We feel confident that upon publication of the opinion of the Court of Appeals this question will now be presented to the federal courts in a large number of cases. For that reason we consider the question to be an important question of federal law which should be determined by this court at the outset before a conflict between circuits arises.

For convenience we repeat the statute:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States * * * and shall recover threefold the damage by him sustained, and the cost of suit including a reasonable attorney's fee." 15 U.S.C. 15

To us it seems plain that the words "threefold the damages by him sustained" are limited by the preceding words "injured by reason of anything forbidden in the antitrust laws". The Sherman Act forbids only contracts and conspiracies "in restraint of trade or commerce among the several States, or with foreign nations". (15 U.S.C. 1) The injury to respondent's intrastate business by petitioner's unfair competition was not forbidden by the Sherman Act. Why should respondent be compensated as though the injury to the intrastate business had been forbidden by the Sherman Act?

Since this is a question of first impression, we have no authorities directly in point. We believe, however, that cases explaining under what circumstances a restraint is a violation of the Sherman Act throw considerable light on the subject.

The Sherman Act and the Clayton Act have separate and distinct jurisdictional requirements. Under the Sherman Act the test is whether interstate commerce is re-

strained. It is not necessary that either plaintiff or defendant be engaged in interstate commerce, nor in commerce at all.[4] On the other hand the fact that plaintiff, defendant or both are engaged in interstate commerce does not bring the case under the Sherman Act if interstate commerce is not restrained.[5] The test in every case is whether or not interstate commerce is restrained.

In *Page* v. *Work*, 9 Cir., 290 F.2d 323, cert. den. 368 U.S. 875, the court said:

> "* * * The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." (p. 330)

> "* * * We recognize that the general language of the Sherman Act and of the Clayton Act was designed by Congress to exercise its powers under the Commerce Clause of the Constitution, U.S. Const. art. I, § 8, cl. 3, to the fullest extent, nevertheless, it must be interstate commerce which feels the pinch, or competition in interstate commerce which may be substantially lessened, or where there is a tendency toward the creation of a monopoly in interstate commerce, before the provisions of said sections become applicable." (p. 333)

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4. Plaintiff not in interstate commerce: *Chattanooga Foundry & P. Works* v. *Atlanta*, 203 U.S. 390.

Defendant not in interstate commerce: *Bedford Cut Stone Co.* v. *Journeymen S. C. Ass'n.*, 274 U.S. 37.

Neither plaintiff nor defendant in interstate commerce: *White Bear Theatre Corp.* v. *State Theatre Corp.*, 8 Cir., 129 F.2d 600.

5. Defendant in interstate commerce: *Foster & Kleiser Co.* v. *Special Site Sign Co.*, 9 Cir., 85 F.2d 742, cert. den. 299 U.S. 613.

Both plaintiff and defendants in interstate commerce: *Page* v. *Work*, 9 Cir., 290 F.2d 323, cert. den. 368 U.S. 875.

The limitation of the Sherman Act to "commerce among the several states" "was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes * * *". *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495. It is at least doubtful that Congress possesses the power to impose penalties for restraints of intrastate trade, even when coupled with restraint of interstate trade. Nothing in the words of 15 U.S.C. 15 indicates any attempt to do so.

The restraint of respondent's intrastate trade cannot be said to be incidental to the restraint of respondent's interstate trade. The converse is true. Respondent's exhibit 9 shows that of respondent's precompetition sales of $323,474.00 only $12,050.74 were interstate.[6]

II

Respondent's Exclusive Dealing Contracts Were Unreasonable Restraints of Petitioner's Interstate Competition Without Regard to Amount of Commerce Restrained

A. Because Such Contracts Violated State Law

We recognize that only unreasonable restraints are forbidden by section 1 of the Sherman Act. "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *White Motor Company* v. *United States*, 372 U.S. 253, 261, quoting from *Board of Trade* v. *United States*, 246 U.S. 231, 238. The Kansas legislature has determined as a matter of law that exclusive dealing contracts suppress competition.[7] This determination makes

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6. L & F $9,676.56, Springfield $1,261.09, Walsh Food $679.10, Walsh Variety $433.99 (Respondent's exhibit 9, pp. 2-4, Ex. Book).

7. Kan. St. Ann. 16-112, *infra* p. A11.

unnecessary inquiry into the nature and effect of the restraint or its purpose. Respondent is not entitled to assert nor the courts to conclude as a matter of fact that a restraint legislatively forbidden is not unreasonable.[8]

The court below correctly pointed out that violation of section 1 of the Sherman Act is determined by the character of the restraint rather than the amount of commerce restrained. (Opin. *infra* p. A6) It applied the doctrine to petitioner's *unfair competition*. It refused to apply it to respondent's *illegal* contracts.

B. Because Respondent Was a Monopolist

Wholly apart from the Kansas statute, the exclusive dealing contracts were an unreasonable restraint of trade because respondent was a monopolist.[9] *International Salt Co.* v. *United States*, 332 U.S. 392, 394-396.

In *Standard Oil Company of California* v. *United States*, 337 U.S. 293, 308-309, the court discussed requirements contracts in the following language:

> "* * * If this distinction were accepted, various tests of the economic usefulness or restrictive effect

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8. Cf. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 63-68, concisely analyzed in *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207, 211; *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 466-468.

9. "* * * Pioneer * * * had become the predominant rack jobber in Western Kansas and Southeastern Colorado." (Opin. *infra* p. A2).

"Q. As I get the picture you didn't have much competition out there until Pioneer started servicing that area, or Perryton started servicing that area; is that correct?

"A. Outside of local competition within a given town, where you had a local tobacco house or wholesale house or something like that, like Dodge City or Liberal that called on some stores in their town, that would be true." (P.R. 281).

of requirements contracts would become relevant. Among them would be evidence that competition has flourished despite use of the contracts, and under this test much of the evidence tendered by appellant in this case would be important. See, as examples of the consideration of such evidence, B. S. Pearsall Butter Co. v. Federal Trade Commission, 292 F. 270 (C.C.A. 7th Cir.); Pick Mfg. Co. v. General Motors Corp., 80 F.2d 641, 644 (C.C.A. 7th Cir.) affd 299 U.S. 3, 81 L.ed. 4, 57 S.Ct. 1. Likewise bearing on whether or not the contracts were being used to suppress competition, would be the conformity of the length of their term to the reasonable requirements of the field of commerce in which they were used. See Corn Products Ref. Co. v. Federal Trade Commission, 144 F.2d 211, 220 (C.C.A. 7th Cir.) affd 324 U.S. 726, 89 L.ed. 1320, 65 S.Ct. 961; United States v. Pullman Co., 50 F. Supp. 123, 127-129) (D.C. Pa.). Still another test would be the status of the defendant as a struggling newcomer or an established competitor. Perhaps most important, however, would be the defendant's degree of market control, for the greater the dominance of his position, the stronger the inference that an important factor in attaining and maintaining that position has been the use of requirements contracts to stifle competition rather than to serve legitimate economic needs. See Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 66 L.ed. 653, 42 S.Ct. 360, and Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457, 85 L.ed. 949, 61 S.Ct. 703, both supra.

"Yet serious difficulties would attend the attempt to apply these tests. We may assume, as did the court below, that no improvement of Standard's competitive position has coincided with the period during which the requirements-contract system of distribution has been in effect. We may assume further that the duration of the contracts is not excessive and that Standard does not by itself dominate the market. But Standard was a major competitor when

the present system was adopted, and it is possible that its position would have deteriorated but for the adoption of that system. When it is remembered that all the other major suppliers have also been using requirements contracts, and when it is noted that the relative share of the business which fell to each has remained about the same during the period of their use, it would not be farfetched to infer that their effect has been to enable the established suppliers individually to maintain their own standing and at the same time collectively, even though not collusively, to prevent a late arrival from wresting away more than an insignificant portion of the market."

Respondent's contract is an exclusive dealing contract far more restrictive than a requirements contract, and respondent was predominant, whereas Standard Oil Co. of California was not.

III

Relevant Market Was Rack Jobbing Market in Area of Competition

For Sherman Act purposes the relevant market "is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *United States* v. *E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 404.

"A determination of the 'part of the trade of commerce' encompassed by the Sherman Act involves distinctions in degree as well as distinctions in kind." *International Boxing Club* v. *United States*, 385 U.S. 242, 251.

Following these principles, championship boxing matches have been held a relevant market as distinguished from boxing matches in general (*International Boxing Club* v. *United States, supra*) and first run motion pictures have been held a relevant market as distinguished

from motion pictures in general. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131.

The relevant market for automotive finishes and fabrics is coextensive with the automobile industry, not with the total market for finishes and fabrics. *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593.

One of the most recent statements in regard to relevant market is found in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325, where the court said:

> "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes * * *. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."

The testimony of plaintiff's president clearly establishes the relevant market as the rack jobbing of nonfood items to grocery stores.

Rack jobbing is recognized as a distinct and separate trade from wholesalers or jobbers. (P.R. 93-94, 275) In the words of plaintiff's president, "That is a category all by itself * * *". (P.R. 275)

The trade has the peculiar characteristic of offering merchandise with a service. "In other words, we are a service organization. There is a million places to get merchandise but merchandise with a service is different." (P.R. 275)

Rack jobbers have a distinct class of customers. They consist almost entirely of grocers, whose stock of non-food merchandise amounts to only about five per cent of his total stock. (P.R. 93) "The reason why you sell your service is because non-foods are a very difficult type of merchandise to handle that the grocery man isn't familiar with and he—and they cannot be bought out of a grocery house like they buy potatoes or other groceries, generally speaking, because each thing has a season of a month or a week or a very short season and is a continually revolving type of merchandise that you have to be putting in and taking out of a grocery store. So they do business with rack jobbers." (P.R. 94)

"* * * you buy on a different price, different setup * * * from manufacturers than anyone of the other levels do." (P.R. 275)

That testimony established the rack jobbing market as the relevant market under the tests of *Brown Shoe Co. v. United States, supra.* They have distinct customers. They have distinct prices. They are specialized vendors with distinct service obligations, including selection of merchandise, placement on display racks, acceptance for credit of unsold merchandise, preparation of federal excise returns. Their grocery customers can't turn to jobbers or wholesalers as substitute suppliers because the grocers do not know what merchandise to order for a particular season, nor how to display it.

With the relevant market limited to the rack jobbing market, the amount of competition restrained was very substantial. The Mammel chain had agreed to substitute petitioner for respondent as its rack jobber. (P.R. 279, 316) It was prevented from doing so by respondent's threat to sue to enforce the exclusive dealing contract. (P.R. 147, 279, 285) That chain alone accounted

for $148,494.00 of respondent's precompetition sales of $323,474.00. (Respondent's exhibit 9, pp. 2-4, Ex. Book)

CONCLUSION

"The Sherman Act was designed as a comprehensive charter of economic freedom aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Railway Company* v. *United States,* 356 U.S. 1, 4.

As applied by the court below in this case, the monopolist is protected from unfair competition, but its interstate competitor is not protected from the illegal means by which the monopoly is maintained. This inconsistency appears on the face of the opinion. It can only add confusion to a complex field of law. We believe this confusion should be corrected by this court before it becomes more widespread.

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of Court of Appeals

Before PHILLIPS, LEWIS and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The trial court awarded injunctive relief and damages to appellee-plaintiff Pioneer Distributing Company of Kansas, Inc. (Pioneer) under the Sherman and Clayton antitrust acts.[1] Appellant-defendant Perryton Wholesale, Inc. (Perryton) has appealed.

Pioneer and Perryton are each in the business known in the trade as that of a rack jobber. A rack jobber is one who sells non-food items, such as cosmetics, beauty aids, drugs, phonograph records, toys, soft goods, household utensils, and like products, to grocery stores and other retail merchandisers. Rack jobbers are distinguished from other merchandisers by their method of operation. A rack jobber furnishes a retailer with the racks on which the merchandise is displayed, visits the outlet frequently to stock the racks, accepts merchandise which has not been sold in a reasonable time for credit, and possesses some skill or knowledge in the placing of items on the racks at favorable times in given areas. The route salesmen for a rack jobber solicit new accounts and service existing accounts by taking orders once or twice a week. The orders are sent to a central warehouse from which deliveries are made to the retailers. The training of route salesmen is important to the success of a rack jobber.

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1. 15 U.S.C. §§ 1, 15, and 26.

Over a period of years Pioneer had built up its business in an area including parts of several states and had become the predominant rack jobber in Western Kansas and Southeastern Colorado. Perryton entered the rack jobbing field in 1960. Before February, 1961, Perryton did not operate in the same area as did Pioneer except for Liberal, Kansas.

In May, 1960, Austin, a long-time and trusted employee of Pioneer who had full knowledge of Pioneer's operations, routes and customers, left Pioneer to become sales manager for Perryton. Before and after leaving Pioneer, Austin tried to persuade other Pioneer employees to leave that company and to come over to Perryton bringing with them as much of the Pioneer business as was possible. Lehr, a supervisor for Pioneer in Western Kansas and Colorado with 10 salesmen under him, was a close friend of Austin, and before Austin's departure from Pioneer the two discussed the shift from Pioneer to Perryton. In February, 1961, Hink, an experienced route salesman under Lehr, quit Pioneer on a Saturday and began work for Perryton on the following Monday, calling on the same customers in the same territory which he had serviced for Pioneer. The activities of Hink resulted in the loss of many accounts by Pioneer. Lehr knew, but did not inform Pioneer, of the activities of Hink. Two other salesmen, Ryan and Davidson, left Pioneer for Perryton. Before leaving Pioneer, Davidson told his customers that he was terminating and asked them to change their accounts to his new employer. As a salesman for Perryton, Davidson serviced his former Pioneer accounts.

On June 3, 1961, Lehr told Pioneer he was taking a two-week vacation. During that period he visited one of the important Pioneer accounts with the express purpose

of switching it to Perryton. He did not return to Pioneer but entered the employment of Perryton. The trial court found that Lehr intended to take every account from Pioneer that he could. Three other employees of Pioneer, Little, Barnes, and Keeler, who were aware of the activities of Lehr and were expected by Lehr to participate therein, remained in the employment of Pioneer.

Pioneer's claim for injunctive relief was heard by Judge Hill who made findings of fact and conclusions of law and entered a permanent injunction against Perryton on the ground that Perryton was guilty of a conspiracy and combination in restraint of trade in violation of 15 U.S.C. § 1 and, accordingly, Pioneer was entitled to injunctive relief under 15 U.S.C. § 26. Judge Brown heard the claim for damages. He adopted the findings and conclusions of Judge Hill, and gave judgment for Pioneer in the amount of $97,826. This appeal is from both the judgment granting injunctive relief and the judgment awarding damages.

Perryton attacks the sufficiency of the evidence. It first says that no wrong occurs when one solicits his competitor's at-will employees to come and work for him. This brings up the ancillary question of the contracts which Pioneer had with its employees. These contained restrictive covenants whereby the employees agreed not to enter the rack jobbing business for a period of one year after termination of employment in competition with Pioneer in named states. Contracts of this type have the approval of the Kansas courts.[2] Perryton's reliance on McCluer v. Super Maid Cook-Ware Corp., 10 Cir., 62 F.2d 426, a case arising in Kansas, is misplaced. That case is

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2. See Kent Oil Co. v. Waddill, 127 Kan. 704, 274 Pac. 1113, and Foltz v. Struxness, 168 Kan. 714, 215 P.2d 133.

distinguishable on the facts, does not cite any Kansas cases, and was decided before Erie Railroad Co. v. Tompkins, 304 U.S. 64, which requires federal courts to apply state law in such circumstances.

We fail to see the pertinence of the argument based on the salesmen's contracts. These contracts were not for a definite term. The salesmen were free to terminate, subject to the restrictive provisions. We are not concerned with breach of contract. The questions are whether Perryton conspired to solicit and use Pioneer's employees to acquire for Perryton the business of Pioneer in Western Kansas and Colorado and whether such conspiracy, if established, violated the federal antitrust laws.

In Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 259, the Supreme Court said in substance that to persuade a "rival's clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places" was unfair competition. By its conspiratorial conduct Perryton successfully induced several trained and trusted employees of Pioneer to change sides in the competitive battle and to bring with them Pioneer's customers, routes, and business methods. As a result Pioneer lost business and was subjected to the troublesome burden of both shifting and training personnel to take the places of the deserters in an effort to maintain a competitive position. The record sustains the trial court's findings of conspiracy. The purpose and methods of the conspiracy exceed the bounds of fair competition.

Perryton urges that unfair competition does not suffice to establish a violation of § 1 of the Sherman Act. A breach of the conventional standards of fairness and morality is not enough standing alone. The statute applies when there is a conspiracy to impose an unreason-

able restraint on interstate trade and commerce. This occurs when a conspiracy exists to suppress competition in interstate trade through the elimination of a competitor by unfair means. Perryton relies on Ace Beer Distributors, Inc. v. Kohn, Inc., 6 Cir., 318 F.2d 283, certiorari denied 375 U.S. 922. In that case the object of the conspiracy was the termination of plaintiff's distributorship and, as an incident thereto, the proselyting of plaintiff's employees. The court pointed out that the substitution of one distributor for another "does not eliminate or materially diminish the existing competition" and was not an unreasonable restraint of trade. In Feddersen Motors, Inc. v. Ward, 10 Cir., 180 F.2d 519, and Shotkin v. General Electric Co., 10 Cir., 171 F.2d 236, we held that a conspiracy to terminate a distributorship is not an antitrust violation. In our opinion the distributorship cases are not applicable here. The success of the conspiracy in those cases resulted in the substitution of one distributor for another. This changed the identity of a competitor but did not eliminate competition. In the case at bar the intent of the conspiracy was to eliminate the competitor predominant in the area by the subversion of its employees. Such elimination destroys rather than maintains competition, is an unreasonable restraint on trade, and violates the statute. See Albert Pick-Barth Co., Inc. v. Mitchell Woodbury Corp., 1 Cir., 57 F.2d 96, certiorari denied 286 U.S. 552, and Atlantic Heel Co., Inc. v. Allied Heel Co., Inc., 1 Cir., 284 F.2d 879.

Perryton urges that the impact on interstate commerce is not substantial enough to invoke the application of the federal antitrust laws. The court found a total loss of profits because of the conspiracy in the amount of $13,140.96, of which $1,938.31 arose from Colorado operations. Damages because of loss of fixtures and merchandise was fixed at $4,146.21, of which $652 occurred in

Colorado. Pioneer was a Kansas based firm distributing out of a Wichita warehouse in which the goods came to rest. The argument is that the only effect on interstate commerce is that reflected by the business done in Colorado.

In United States v. Yellow Cab Co., 332 U.S. 218, 225, and in Apex Hosiery Co. v. Leader, 310 U.S. 469, 485, the Supreme Court said a § 1 Sherman Act violation is determined by the nature of the restraint and not by the amount of commerce affected. In Union Carbide and Carbon Corporation v. Nisley, 10 Cir., 300 F.2d 561, 585, certiorari dismissed sub nom. 371 U.S. 801, we said that § 1 condemns unreasonable restraint "irrespective of the amount of trade or commerce involved." As we have shown the restraint is unreasonable. That vice is not removed by the low dollar amount of the damages resulting from loss of interstate trade.

On the injunction issue Perryton urges that the individuals participating in the conspiracy were indispensable parties. The injunction restrained Perryton from engaging in the activities which constituted the conspiracy for a period of five years in a defined geographical area. The conduct of individuals is restrained only to the extent that they are employees of Perryton. In a suit to enjoin a conspiracy a plaintiff need not join all the conspirators as parties defendant.[3]

No appeal was taken from the judgment granting a permanent injunction. In pre-trial proceedings on the issue of damages the court ruled that the findings of fact and conclusions of law on the injunction issue were binding on the damages issue. Perryton urges that it was entitled

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3. Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 463.

to a jury trial on the issue of liability for damages under the Sherman Act.

The situation is that Perryton filed a timely demand for jury trial before the hearing on the injunction. When that hearing began counsel for Perryton agreed that the cause should proceed to hearing before the court on all issues except damages and that they desired a jury trial on damages. A pre-trial order entered prior to the trial on damages says that the "[d]efendant [Perryton] withdraws its demand for a jury."[4]

We are not faced with the problem of a right to jury trial which arises when there is a blending of legal and equitable claims.[5] Perryton assented both to the trial of the injunction and the trial of damages by the court without a jury.[6] The decision of the injunction claim finally determined all issues common both to it and the claim for damages.[7] It is unimportant whether this operates by way

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4. The pertinent provision of the order reads: "Defendant withdraws its demand for jury, asserting it is prejudiced by being forced to trial on claims for damages on both Counts I and III." Count I asks treble damages under 15 U.S.C. § 15; Count II asks injunctive relief under 15 U.S.C. § 26; Count III is based on common law unfair competition and asks both damages and an injunction. Damages were granted under § 15 and an injunction under § 26. Perryton fails to show how it was damaged by the consideration, if any, given common law unfair competition.

5. See Dairy Queen, Inc. v. Wood, 369 U.S. 469, and Beacon Theatres, Inc. v. Westover, 359 U.S. 500.

6. In AMF Tuboscope, Inc. v. Cunningham, 10 Cir., ... F.2d ....., we said that "the right of trial by jury in the Federal courts cannot be dispensed with, except by the assent of the parties entitled to it and cannot be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief."

See also Chappell & Co., Inc. v. Palermo Cafe Co., Inc., 1 Cir., 249 F.2d 77, 81.

7. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472.

of res judicata or collateral estoppel.[8] The important consideration is that the question of a violation of § 1 was tried and determined. Perryton was not entitled to a retrial of this issue before another judge.

Perryton objects to the award of damages because of the loss of Kansas sales and says that the award should be confined to Colorado losses because only the Colorado business was interstate in character. The Clayton Act[9] provides that a person injured by anything forbidden by the antitrust laws "shall recover threefold the damages by him sustained." We read this to mean that when an antitrust violation is established, all damages, both local and interstate, arising from the violation are recoverable. The contrary arguments advanced and authorities cited go to the question of whether the violation exists. We have held that the conduct of Perryton violates § 1.

Perryton makes a shotgun attack on the award of damages, claiming deficiencies in proof and use of improper elements. The court found actual damages in the amount of $28,442.07 for loss of profits, extraordinary direct expenses, and deprivation of fixtures and merchandise. This was trebled under § 15 to make an award of $85,326.21 to which was added attorneys' fees in the amount of $12,500. A detailed analysis of the many items would be fruitless. We believe that the trial court correctly applied the principles which we have stated in Union Carbide and Carbon Corp. v. Nisley, 10 Cir., 300 F.2d 561, certiorari dismissed sub nom. 371 U.S. 218, and in Atlas Building Products Co. v. Diamond Block & Gravel Co., 10 Cir., 269 F.2d 950, certiorari denied 363 U.S. 843. The amount awarded was well within the proof.

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8. See Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504.

9. 15 U.S.C. § 15.

The Clayton Act, 15 U.S.C. § 15, permits recovery of a "reasonable attorney's fee." Perryton says that the award of $12,500 for attorneys' fees improperly included compensation for obtaining injunctive relief under § 1. The point is without merit. The injunction hearing established the § 1 violation which brought into operation the treble damages provisions of § 15. The award is within the figure stated by the only witness who testified on the point. The court did not abuse its discretion in making the award.[10]

Perryton asserted by way of counterclaim that Pioneer's contracts with its dealers violated the antitrust laws; that Perryton has been damaged thereby; and that Perryton may off-set the amount of such damage against Pioneer's damage claims. Two types of contracts are presented. One is a fixture lease agreement which does not prohibit the retailer from dealing in the same or similar goods so long as he does not use for that purpose the fixture supplied by Pioneer. Such contracts are permissible under Federal Trade Commission v. Sinclair Refining Co., 261 U.S. 463, 474, and Standard Oil Co. v. United States, 337 U.S. 293, 303. Before adopting this type of contract Pioneer used for an undisclosed time with an undisclosed number of dealers a contract applicable only to drugs and cosmetics which provided that the retailer would "display and merchandise" the covered items at "recommended retail prices" and would not handle competitive items.

Section 3 of the Clayton Act[11] forbids exclusive dealing contracts where the effect thereof is "to substantially

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10. See Twentieth Century Fox Film Corp. v. Goldwyn, 9 Cir., 328 F.2d 190, 221, certiorari denied 379 U.S. 880.

11. 15 U.S.C. § 14.

lessen competition or tend to create a monopoly in any line of commerce." This requires proof that competition has been foreclosed in a substantial share of the line of commerce affected.[12] The record shows that Pioneer supplied about 5% of the total volume of the items which it handled in the pertinent areas, an unsubstantial amount. Perryton's insistence that a rack jobber sells service rather than commodities is not persuasive. The services performed are but incidental to the sale of the merchandise. The trial court properly rejected the counterclaim.

We do not resolve at this time the question of the right of Pioneer to an allowance for attorneys' fees in connection with this appeal. We will determine this issue upon the filing of a motion for such an allowance and the response thereto.

Affirmed.

Statutes Cited

Sherman Act, section 1 (15 U.S.C. 1)

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal:"

Clayton Act, section 3 (15 U.S.C. 14)

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the

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12. Standard Oil Co. v. United States, 337 U.S. 293, 314.

United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Clayton Act, section 4 (15 U.S.C. 15)

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Kan. St. Ann. 16-112

"Restraint of trade; penalty. A person, firm, corporation or association of persons doing business in this state shall not make it a condition of the sale of goods, wares or merchandise that the purchaser shall not sell or deal in the goods, wares or merchandise of any other person, firm, corporation, or association of persons, but the provisions of this section shall not prohibit the appointment of agents or sole agents for the sale of, nor the making of contracts for the exclusive sale of, goods, wares, or merchandise. Whoever, as principal or agent, violates the provisions of this section shall be punished for the first offense by a fine of not less than fifty nor more than one hundred dollars; and for each succeeding offense by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment."